



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-6046/P2
MED:amn&wlj

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

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1 **AN ACT** *to renumber and amend* 227.40 (3) (intro.) and 227.40 (3) (a); *to amend*
2 13.91 (1) (c), 227.01 (13) (intro.), subchapter II (title) of chapter 227 [precedes
3 227.10], 227.11 (title), 227.40 (1), 227.40 (2) (intro.), 227.40 (2) (e), 227.40 (3) (b)
4 and (c), 227.40 (4) (a), 227.40 (6), 227.57 (11) and 801.50 (3) (b); and **to create**
5 35.93 (2) (b) 3. im., 227.01 (3m), 227.10 (2g), 227.11 (3) and 227.112 of the
6 statutes; **relating to:** deference by courts to agency interpretations of law,
7 notice and comment requirements for guidance documents issued by agencies,
8 and agency rule-making authority.

Analysis by the Legislative Reference Bureau *H*

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This bill 1) prohibits a court from according deference to agency interpretations of law in certain proceedings and prohibits agencies from seeking deference in any proceeding to agency interpretations of law; 2) establishes various requirements with respect to the adoption and use of guidance documents by agencies, including requirements that agencies must comply with in order to adopt guidance documents; and 3) provides that settlement agreements do not confer rule-making authority.

Agency interpretations of law

Generally under current law, when reviewing an agency decision in a contested case or other matter subject to judicial review under the law governing

administrative procedure for state agencies, a court must accord due weight to the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. Consistent with the Wisconsin Supreme Court's decision in *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, the bill limits this directive such that a court performing judicial review of such a decision must accord no deference to an agency's interpretation of law.

The bill also provides that no agency may seek deference in any proceeding based on the agency's interpretation of any law.

Guidance documents

Subject to various exceptions, the bill defines "guidance document" as any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that 1) explains the agency's implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency; or 2) provides guidance or advice with respect to how the agency is likely to apply any statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected.

The bill requires each agency to submit each proposed guidance document to the Legislative Reference Bureau for publication in the register and to provide a period for persons to submit written comments to the agency on the proposed guidance document. The agency must retain all written comments submitted during the public comment period and consider those comments in determining whether to adopt the guidance document as originally proposed, modify the proposed guidance document, or take any other action. The bill allows for a comment period of less than 21 days with the approval of the governor. The bill also requires each adopted guidance document, while valid, to remain available on the agency's Internet site and requires the agency to permit continuing public comment on the guidance document. Each guidance document must be signed by the head of the agency below a statement containing certain certifications.

The bill provides that a guidance document does not have the force of law and does not provide the authority for implementing or enforcing a standard, requirement, or threshold, including as a term or condition of any license. An agency that proposes to rely on a guidance document to the detriment of a person in any proceeding must afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the guidance document, and an agency may not use a guidance document to foreclose consideration of any issue raised in the guidance document. The bill also contains other provisions with respect to agency use of and reliance upon guidance documents, allows certain persons to petition an agency to promulgate a rule in place of a guidance document, and makes guidance documents subject to the same judicial review provisions as apply to rules.

The bill requires the Legislative Council staff to provide agencies with assistance in determining whether documents and communications are guidance documents as defined in the bill.

The bill provides that, as of six months after the bill's effective date, any guidance document that does not comply with the requirements in the bill is considered to be rescinded.

Agency rule-making authority; settlement agreements

The bill provides that a settlement agreement, consent decree, or court order does not confer rule-making authority and cannot be used by an agency as authority to promulgate rules. The bill provides that no agency may agree to promulgate a rule as a term in any settlement agreement, consent decree, or stipulated order of a court unless the agency has explicit statutory authority to promulgate the rule at the time the settlement agreement, consent decree, or stipulated order of a court is executed.

For further information see the **state** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 13.91 (1) (c) of the statutes is amended to read:

2 13.91 (1) (c) Perform the functions prescribed in s. 227.15 for the review and
3 ~~resolution of problems~~ ch. 227 relating to administrative rules and guidance
4 documents.

5 **SECTION 2.** 35.93 (2) (b) 3. im. of the statutes is created to read:

6 35.93 (2) (b) 3. im. Notices of public comment periods on proposed guidance
7 documents under s. 227.112 (1) (a).

8 **SECTION 3.** 227.01 (3m) of the statutes is created to read:

9 227.01 (3m) (a) "Guidance document" means, except as provided in par. (b), any
10 formal or official document or communication issued by an agency, including a
11 manual, handbook, directive, or informational bulletin, that does any of the
12 following:

13 1. Explains the agency's implementation of a statute or rule enforced or
14 administered by the agency, including the current or proposed operating procedure
15 of the agency.

1 2. Provides guidance or advice with respect to how the agency is likely to apply
2 a statute or rule enforced or administered by the agency, if that guidance or advice
3 is likely to apply to a class of persons similarly affected.

4 (b) "Guidance document" does not include any of the following:

5 1. A rule that has been promulgated and that is currently in effect or a proposed
6 rule that is in the process of being promulgated.

7 2. A standard adopted, or a statement of policy or interpretation made, whether
8 preliminary or final, in the decision of a contested case, in a private letter ruling
9 under s. 73.035, or in an agency decision upon or disposition of a particular matter
10 as applied to a specific set of facts.

11 3. Any document or activity described in sub. (13) (a) to (zz), except that
12 "guidance document" includes a pamphlet or other explanatory material described
13 under sub. (13) (r) that otherwise satisfies the definition of "guidance document"
14 under par. (a).

15 4. Any document that any statute specifically provides is not required to be
16 promulgated as a rule.

17 5. A declaratory ruling issued under s. 227.41.

18 6. A pleading or brief filed in court by the state, an agency, or an agency official.

19 7. A letter or written legal advice of the department of justice or a formal or
20 informal opinion of the attorney general, including an opinion issued under s.
21 165.015 (1).

22 8. Any document or communication for which a procedure for public input,
23 other than that provided under s. 227.112 (1), is provided by law.

24 9. Any document or communication that is not subject to the right of inspection
25 and copying under s. 19.35 (1).

1 **SECTION 4.** 227.01 (13) (intro.) of the statutes is amended to read:

2 227.01 (13) (intro.) "Rule" means a regulation, standard, statement of policy,
3 or general order of general application which that has the effect force of law and
4 ~~which~~ that is issued by an agency to implement, interpret, or make specific
5 legislation enforced or administered by the agency or to govern the organization or
6 procedure of the agency. "Rule" includes a modification of a rule under s. 227.265.
7 "Rule" does not include, and s. 227.10 does not apply to, any action or inaction of an
8 agency, whether it would otherwise meet the definition under this subsection, ~~which~~
9 ~~that:~~

10 **SECTION 5.** Subchapter II (title) of chapter 227 [precedes 227.10] of the statutes
11 is amended to read:

CHAPTER 227

SUBCHAPTER II

ADMINISTRATIVE RULES AND

GUIDANCE DOCUMENTS

16 **SECTION 6.** 227.10 (2g) of the statutes is created to read:

227.10 (2g) No agency may seek deference in any proceeding based on the
agency's interpretation of any law.

19 **SECTION 7.** 227.11 (title) of the statutes is amended to read:

20 **227.11** (title) ~~Extent to which chapter confers~~ Agency rule-making
21 **authority.**

22 **SECTION 8.** 227.11 (3) of the statutes is created to read:

23 ~~227.11 (4)~~ A settlement agreement, consent decree, or court order does not
24 confer rule-making authority and cannot be used by an agency as authority to
25 promulgate rules. No agency may agree to promulgate a rule as a term in any

(b)

1 settlement agreement, consent decree, or stipulated order of a court unless the
2 agency has explicit statutory authority to promulgate the rule at the time the
3 settlement agreement, consent decree, or stipulated order of a court is executed.

4 **SECTION 9.** 227.112 of the statutes is created to read:

5 **227.112 Guidance documents.** (1) (a) Before adopting a guidance document,
6 an agency shall submit to the legislative reference bureau the proposed guidance
7 document with a notice of a public comment period on the proposed guidance
8 document under par. (b), in a format approved by the legislative reference bureau,
9 for publication in the register. The notice shall specify the place where comments
10 should be submitted and the deadline for submitting those comments.

11 (b) The agency shall provide for a period for public comment on a proposed
12 guidance document submitted under par. (a), during which any person may submit
13 written comments to the agency with respect to the proposed guidance document.
14 Except as provided in par. (c), the period for public comment shall end no sooner than
15 the 21st day after the date on which the proposed guidance document is published
16 in the register under s. 35.93 (2) (b) 3. im. The agency may not adopt the proposed
17 guidance document until the comment period has concluded and the agency has
18 complied with par. (d).

19 (c) An agency may hold a public comment period shorter than 21 days with the
20 approval of the governor.

21 (d) An agency shall retain all written comments submitted during the public
22 comment period under par. (b) and shall consider those comments in determining
23 whether to adopt the guidance document as originally proposed, modify the proposed
24 guidance document, or take any other action.

1 (2) An agency shall post each guidance document that the agency has adopted
2 on the agency's Internet site and shall permit continuing public comment on the
3 guidance document. The agency shall ensure that each guidance document that the
4 agency has adopted remains on the agency's Internet site as provided in this
5 subsection until the guidance document is no longer in effect, is no longer valid, or
6 is superseded or until the agency otherwise rescinds its adoption of the guidance
7 document.

8 (3) A guidance document does not have the force of law and does not provide
9 the authority for implementing or enforcing a standard, requirement, or threshold,
10 including as a term or condition of any license. An agency that proposes to rely on
11 a guidance document to the detriment of a person in any proceeding shall afford the
12 person an adequate opportunity to contest the legality or wisdom of a position taken
13 in the guidance document. An agency may not use a guidance document to foreclose
14 consideration of any issue raised in the guidance document.

15 (4) If an agency proposes to act in any proceeding at variance with a position
16 expressed in a guidance document, it shall provide a reasonable explanation for the
17 variance. If an affected person in any proceeding may have relied reasonably on the
18 agency's position, the explanation must include a reasonable justification for the
19 agency's conclusion that the need for the variance outweighs the affected person's
20 reliance interest.

21 (5) Persons that qualify under s. 227.12 to petition an agency to promulgate
22 a rule may, as provided in s. 227.12, petition an agency to promulgate a rule in place
23 of a guidance document.

24 (6) Any guidance document shall be signed by the secretary or head of the
25 agency below the following certification: "I have reviewed this guidance document

1 or proposed guidance document and I certify that it complies with sections 227.10
2 and 227.11 of the Wisconsin Statutes. I further certify that the guidance document
3 or proposed guidance document contains no standard, requirement, or threshold
4 that is not explicitly required or explicitly permitted by a statute or a rule that has
5 been lawfully promulgated. I further certify that the guidance document or proposed
6 guidance document contains no standard, requirement, or threshold that is more
7 restrictive than a standard, requirement, or threshold contained in the Wisconsin
8 Statutes.”

9 (7) This section does not apply to guidance documents adopted before the first
10 day of the 7th month beginning after the effective date of this subsection [LRB
11 inserts date], but on that date any guidance document that has not been adopted in
12 accordance with sub. (1) or that does not contain the certification required under sub.
13 (6) shall be considered rescinded.

14 (8) The legislative council staff shall provide agencies with assistance in
15 determining whether documents and communications are guidance documents that
16 are subject to the requirements under this section.

17 **SECTION 10.** 227.40 (1) of the statutes is amended to read:

18 227.40 (1) Except as provided in sub. (2), the exclusive means of judicial review
19 of the validity of a rule or guidance document shall be an action for declaratory
20 judgment as to the validity of the rule or guidance document brought in the circuit
21 court for the county where the party asserting the invalidity of the rule or guidance
22 document resides or has its principal place of business or, if that party is a
23 nonresident or does not have its principal place of business in this state, in the circuit
24 court for the county where the dispute arose. The officer or other agency whose rule
25 or guidance document is involved shall be the party defendant. The summons in the

1 action shall be served as provided in s. 801.11 (3) and by delivering a copy to that
2 officer or, if the agency is composed of more than one person, to the secretary or clerk
3 of the agency or to any member of the agency. The court shall render a declaratory
4 judgment in the action only when it appears from the complaint and the supporting
5 evidence that the rule or guidance document or its threatened application interferes
6 with or impairs, or threatens to interfere with or impair, the legal rights and
7 privileges of the plaintiff. A declaratory judgment may be rendered whether or not
8 the plaintiff has first requested the agency to pass upon the validity of the rule or
9 guidance document in question.

10 **SECTION 11.** 227.40 (2) (intro.) of the statutes is amended to read:

11 227.40 (2) (intro.) The validity of a rule or guidance document may be
12 determined in any of the following judicial proceedings when material therein:

13 **SECTION 12.** 227.40 (2) (e) of the statutes is amended to read:

14 227.40 (2) (e) Proceedings under s. 66.191, 1981 stats., or s. 40.65 (2), 106.50,
15 106.52, 303.07 (7) or 303.21 or ss. 227.52 to 227.58 or under ch. 102, 108 or 949 for
16 review of decisions and orders of administrative agencies if the validity of the rule
17 or guidance document involved was duly challenged in the proceeding before the
18 agency in which the order or decision sought to be reviewed was made or entered.

19 **SECTION 13.** 227.40 (3) (intro.) of the statutes is renumbered 227.40 (3) (ag) and
20 amended to read:

21 227.40 (3) (ag) In any judicial proceeding other than one set out above under
22 sub. (1) or (2), in which the invalidity of a rule or guidance document is material to
23 the cause of action or any defense thereto, the assertion of ~~such~~ that invalidity shall
24 be set forth in the pleading of the party so maintaining the invalidity of ~~such~~ the rule
25 or guidance document in that proceeding. The party so asserting the invalidity of

1 ~~such~~ the rule or guidance document shall, within 30 days after the service of the
2 pleading in which the party sets forth ~~such~~ the invalidity, apply to the court in which
3 ~~such~~ the proceedings are had for an order suspending the trial of ~~said~~ the proceeding
4 until after a determination of the validity of ~~said~~ the rule or guidance document in
5 an action for declaratory judgment under sub. (1) hereof.

6 **SECTION 14.** 227.40 (3) (a) of the statutes is renumbered 227.40 (3) (ar) and
7 amended to read:

8 227.40 (3) (ar) Upon the hearing of ~~such~~ the application, if the court is satisfied
9 that the validity of ~~such~~ the rule or guidance document is material to the issues of
10 the case, an order shall be entered staying the trial of said proceeding until the
11 rendition of a final declaratory judgment in proceedings to be instituted forthwith
12 by the party asserting the invalidity of ~~such~~ the rule or guidance document. If the
13 court ~~shall find~~ finds that the asserted invalidity of ~~a~~ the rule or guidance document
14 is not material to the case, an order shall be entered denying the application for stay.

15 **SECTION 15.** 227.40 (3) (b) and (c) of the statutes are amended to read:

16 227.40 (3) (b) Upon the entry of a final order in ~~said~~ the declaratory judgment
17 action, it shall be the duty of the party who asserts the invalidity of the rule or
18 guidance document to formally advise the court of the outcome of the declaratory
19 judgment action so brought as ordered by the court. After the final disposition of the
20 declaratory judgment action the court shall be bound by and apply the judgment so
21 entered in the trial of the proceeding in which the invalidity of the rule or guidance
22 document is asserted.

23 (c) Failure to set forth the invalidity of a rule or guidance document in a
24 pleading or to commence a declaratory judgment proceeding within a reasonable
25 time pursuant to ~~such~~ the order of the court or to prosecute ~~such~~ the declaratory

1 judgment action without undue delay shall preclude ~~such~~ the party from asserting
2 or maintaining ~~such that the rule or guidance document~~ is invalid.

3 **SECTION 16.** 227.40 (4) (a) of the statutes is amended to read:

4 227.40 (4) (a) In any proceeding pursuant to this section for judicial review of
5 a rule or guidance document, the court shall declare the rule or guidance document
6 invalid if it finds that it violates constitutional provisions or exceeds the statutory
7 authority of the agency or was promulgated or adopted without compliance with
8 statutory rule-making or adoption procedures.

9 **SECTION 17.** 227.40 (6) of the statutes is amended to read:

10 227.40 (6) Upon entry of a final order in a declaratory judgment action under
11 sub. (1) with respect to a rule, the court shall send an electronic notice to the
12 legislative reference bureau of the court's determination as to the validity or
13 invalidity of the rule, in a format approved by the legislative reference bureau, and
14 the legislative reference bureau shall publish a notice of that determination in the
15 Wisconsin administrative register under s. 35.93 (2) and insert an annotation of that
16 determination in the Wisconsin administrative code under s. 13.92 (4) (a).

17 **SECTION 18.** 227.57 (11) of the statutes is amended to read:

W 18 227.57 (11) Upon review of an agency action or decision affecting a property
19 owner's use of the property owner's property, the court shall accord no deference to
20 the agency's interpretation of law if ~~the agency action or decision restricts the~~
21 ~~property owner's free use of the property owner's property.~~

22 **SECTION 19.** 801.50 (3) (b) of the statutes is amended to read:

23 801.50 (3) (b) All actions relating to the validity or invalidity of a rule or
24 guidance document shall be venued as provided in s. 227.40 (1).

25 (END)



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-6024/P1
MED:amn

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

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1 **AN ACT** *to renumber and amend* 227.135 (4) and 227.137 (3) (e); *to amend*
2 227.13, 227.135 (2), 227.137 (2) and 227.137 (4); and *to create* 227.135 (1) (g),
3 227.135 (1) (h), 227.135 (4) (a) 1. to 6., 227.135 (6), 227.137 (3) (e) 1. to 4., 227.137
4 (3m) and 227.18 (3m) of the statutes; **relating to:** various changes regarding
5 administrative rules.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

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6 **SECTION 1.** 227.13 of the statutes is amended to read:

7 **227.13 Advisory committees and informal consultations.** An agency may
8 use informal conferences and consultations to obtain the viewpoint and advice of
9 interested persons with respect to contemplated rule making. An agency also may

1 also appoint a committee of experts, interested persons or representatives of the
2 public to advise it with respect to any contemplated rule making. The Such a
3 committee shall have advisory powers only. Whenever an agency appoints a
4 committee under this section, the agency shall submit a list of the members of the
5 committee to the joint committee for review of administrative rules.

6 **SECTION 2.** 227.135 (1) (g) of the statutes is created to read:

7 227.135 (1) (g) A statement as to whether the agency anticipates that the
8 proposed rule will have minimal or no economic impact, a moderate economic impact,
9 or a significant economic impact, whether locally, statewide, or on a sector of the
10 economy.

****NOTE: The executive order does not define what these standards mean and therefore leaves it up to the agency to decide. Since this is part of the scope statement, the agency may not have much sense of what the impact of the rule will be, but you could try to further define what these terms would mean so as to avoid a lot of variation from agency to agency and rule to rule. The agency's determination here, under the executive order, also determines how long the agency's EIA comment period must be, though it does provide for the adjustment of the comment period based on later changes in the agency's assessment. That material is in SECTION 11 of the bill.

11 **SECTION 3.** 227.135 (1) (h) of the statutes is created to read:

12 227.135 (1) (h) For a proposed emergency rule promulgated under s. 227.24,
13 an explanation of why the rule is necessary for the preservation of the public peace,
14 health, safety, or welfare. If the rule is exempt from the required finding of
15 emergency, the statement of scope shall cite the act number and section or the statute
16 section authorizing the promulgation of an emergency rule or a statement that the
17 rule is promulgated at the direction of the joint committee for review of
18 administrative rules under s. 227.26 (2) (b). The agency shall also include a
19 statement as to whether the agency will promulgate a corresponding permanent rule
20 and the agency's anticipated time line for promulgating the permanent rule.

21 **SECTION 4.** 227.135 (2) of the statutes is amended to read:

1 227.135 (2) An agency that has prepared a statement of the scope of the
2 proposed rule shall present the statement to the department of administration,
3 which shall make a determination as to whether the agency has the explicit
4 authority to promulgate the rule as proposed in the statement of scope and shall
5 report the statement of scope and its determination to the governor who, in his or her
6 discretion, may approve or reject the statement of scope. The agency may not send
7 the statement to the legislative reference bureau for publication under sub. (3) until
8 the governor issues a written notice of approval of the statement and may not,
9 without the written approval of the governor, send the statement to the legislative
10 reference bureau for publication under sub. (3) more than 30 days after the date of
11 the governor's approval of the statement of scope. The agency shall also present the
12 statement to the individual or body with policy-making powers over the subject
13 matter of the proposed rule for approval. The individual or body with policy-making
14 powers may not approve the statement until at least 10 days after publication of the
15 statement under sub. (3) and, if a preliminary public hearing and comment period
16 are held by the agency under s. 227.136, until the individual or body has received and
17 reviewed any public comments and feedback received from the agency under s.
18 227.136 (5). No state employee or official may perform any activity in connection
19 with the drafting of a proposed rule, except for an activity necessary to prepare the
20 statement of the scope of the proposed rule until the governor and the individual or
21 body with policy-making powers over the subject matter of the proposed rule
22 approve the statement. This subsection does not prohibit an agency from performing
23 an activity necessary to prepare a petition and proposed rule for submission under
24 s. 227.26 (4).

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1 **SECTION 5.** 227.135 (4) of the statutes is renumbered 227.135 (4) (a) (intro.) and
2 amended to read:

3 227.135 (4) (a) (intro.) If at any time after a statement of the scope of a proposed
4 rule is approved under sub. (2) the agency changes the scope of the proposed rule in
5 any meaningful or measurable way, ~~including changing the scope of the proposed~~
6 ~~rule so as to include in the scope any activity, business, material, or product that is~~
7 ~~not specifically included in the original scope of the proposed rule~~, the agency shall
8 prepare and obtain approval of a revised statement of the scope of the proposed rule
9 in the same manner as the original statement was prepared and approved under
10 subs. (1) and (2). No For purposes of this subsection, a meaningful or measurable
11 change includes any of the following:

12 (b) Whenever an agency is required to prepare a revised statement of scope
13 under this subsection, no state employee or official may perform any activity in
14 connection with the drafting of the proposed rule except for an activity necessary to
15 prepare the revised statement of the scope of the proposed rule until the revised
16 statement is so approved as provided in sub. (2).

17 **SECTION 6.** 227.135 (4) (a) 1. to 6. of the statutes are created to read:

- 18 227.135 (4) (a) 1. A change to the objectives of the proposed rule.
19 2. A change to the basis and purpose of the proposed rule.
20 3. A change to the policies to be included in the proposed rule.
21 4. A change to the entities affected by the proposed rule.
22 5. A change to the overall breadth or scope of the regulation in the proposed
23 rule.

1 6. A change to the scope of the proposed rule so as to include in the scope any
2 activity, business, material, or product that is not specifically included in the original
3 statement.

4 **SECTION 7.** 227.135 (6) of the statutes is created to read:

5 227.135 (6) An agency that intends to concurrently promulgate an emergency
6 rule and a permanent rule that are identical in substance may submit one statement
7 of scope indicating this intent.

8 **SECTION 8.** 227.137 (2) of the statutes is amended to read:

9 227.137 (2) An agency shall prepare an economic impact analysis for a
10 proposed rule before submitting the proposed rule to the legislative council staff
11 under s. 227.15. Prior to preparing an economic impact analysis as provided in this
12 subsection, the agency shall review the statement of scope for the proposed rule
13 prepared under s. 227.135 to determine whether a revised statement of scope is
14 required under s. 227.135 (4).

15 **SECTION 9.** 227.137 (3) (e) of the statutes is renumbered 227.137 (3) (e) (intro.)
16 and amended to read:

17 227.137 (3) (e) (intro.) A determination made in consultation with the
18 businesses, local governmental units, and individuals that may be affected by the
19 proposed rule as to whether the proposed rule would adversely affect in a material
20 way the economy, a sector of the economy, productivity, jobs, or the overall economic
21 competitiveness of this state. The agency shall make the determination required
22 under this paragraph by doing all of the following:

23 **SECTION 10.** 227.137 (3) (e) 1. to 4. of the statutes are created to read:

24 227.137 (3) (e) 1. Compiling a list of affected persons and potential economic
25 concerns identified in the comments solicited by the agency.

1 2. Contacting affected persons to discuss economic concerns.

2 3. Considering any raised concerns in drafting the economic impact analysis.

3 4. Documenting in the economic impact analysis the persons who were
4 consulted and whether the agency's determination is disputed by any of the affected
5 persons.

6 **SECTION 11.** 227.137 (3m) of the statutes is created to read:

7 227.137 (3m) (a) When soliciting comments under sub. (3) for an economic
8 impact analysis, an agency shall accept comments for a period of at least 14 calendar
9 days if, under s. 227.135 (1) (g), the statement of scope for the proposed rule indicates
10 that the proposed rule will have minimal or no economic impact, at least 30 calendar
11 days if it indicates a moderate economic impact, and at least 60 calendar days if it
12 indicates a significant economic impact or if the agency anticipates that the proposed
13 rule will result in \$10,000,000 or more in implementation and compliance costs being
14 incurred by or passed along to businesses, local governmental units, and individuals
15 over any 2-year period. If the agency subsequently determines that the anticipated
16 economic impact will be greater than indicated in the statement of scope, the agency
17 shall adjust the comment period accordingly. An agency may not reduce a comment
18 period once determined under this subsection.

19 (b) This subsection does not apply to a person preparing an independent
20 economic impact analysis under sub. (4m).

21 **SECTION 12.** 227.137 (4) of the statutes is amended to read:

22 227.137 (4) On the same day that the agency submits the economic impact
23 analysis to the legislative council staff under s. 227.15 (1), the agency shall also
24 submit that analysis to the department of administration, to the governor, and to the
25 chief clerks of each house of the legislature, who shall distribute the analysis to the

1 presiding officers of their respective houses, to the chairpersons of the appropriate
2 standing committees of their respective houses, as designated by those presiding
3 officers, and to the cochairpersons of the joint committee for review of administrative
4 rules. If a proposed rule is modified after the economic impact analysis is submitted
5 under this subsection so that the economic impact of the proposed rule is
6 significantly changed, the agency shall prepare a revised economic impact analysis
7 for the proposed rule as modified. For purposes of this subsection, a significant
8 change includes an increase or a decrease of at least 10 percent or \$50,000, whichever
9 is greater, in the expected implementation and compliance costs reasonably expected
10 to be incurred by or passed along to a majority of the businesses, local governmental
11 units, and individuals as a result of the proposed rule, as identified under sub. (3) (b),
12 or a significant change in the persons expected to be affected by the proposed rule.
13 A revised economic impact analysis shall be prepared and submitted in the same
14 manner as an original economic impact analysis is prepared and submitted.

15 **SECTION 13.** 227.18 (3m) of the statutes is created to read:

16 **227.18 (3m)** If, after holding a hearing under this section, an agency makes any
17 changes to the proposed rule, the agency shall do all of the following:

18 (a) Review the statement of scope of the proposed rule prepared under s.
19 227.135 to determine whether a revised statement of scope is required under s.
20 227.135 (4).

21 (b) Review the economic impact analysis for the proposed rule prepared under
22 s. 227.137 to determine whether a revised economic impact analysis is required
23 under s. 227.137 (4).

24 (END)



Per discussion w/ Steve

add x-ref in 16S.25(6)(a)1. provision to DJ actions (806.04(1))
in the added language ["except as provided"]



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-6071/P1
ALL:all

/P2

RM
NOT
run

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1/11/30
Requested
ASAP pls

1 **AN ACT to repeal** 16.84 (5) (d), 165.055 (3), 227.20 (3) (c), 227.46 (3) (a), 227.46
2 (8), 230.08 (2) (sb) and 238.399 (3) (e); **to renumber** 227.138 (1) (a) to (h); **to**
3 **renumber and amend** 13.90 (3), 15.165 (2), 165.08, 165.25 (6) (a), 227.135 (2),
4 227.135 (4), 227.137 (3) (e), 227.138 (1) (intro.), 227.40 (3) (intro.), 227.40 (3) (a)
5 and 343.50 (1) (c); **to amend** 5.02 (6m) (f), 13.56 (2), 13.90 (2), 13.91 (1) (c),
6 20.455 (1) (gh), 20.455 (2) (gb), 20.455 (3) (g), 45.57, 165.10, 165.25 (1), 165.25
7 (1m), 227.01 (13) (intro.), subchapter II (title) of chapter 227 [precedes 227.10],
8 227.11 (title), 227.13, 227.135 (3), 227.137 (2), 227.137 (4), 227.138 (2), 227.185,
9 227.20 (3) (a), 227.24 (1) (e) 1d., 227.24 (1) (e) 1g., 227.40 (1), 227.40 (2) (intro.),
10 227.40 (2) (e), 227.40 (3) (b) and (c), 227.40 (4) (a), 227.40 (6), 227.46 (1) (h),
11 227.46 (2), 227.46 (2m), 227.47 (1), 227.57 (11), 238.02 (1), 238.02 (2), 238.02 (3),
12 238.399 (3) (a), 281.665 (5) (d), 343.50 (3) (b), 801.50 (3) (b), 806.04 (11), 809.13
13 and subchapter VIII (title) of chapter 893 [precedes 893.80]; and **to create**
14 13.103, 13.124, 13.127, 13.365, 13.48 (24m), 13.90 (3) (a) and (b), 15.07 (1) (b)
15 24., 15.165 (2) (d) and (f) to (i), 16.42 (5), 16.84 (2m), 16.973 (15), 35.93 (2) (b)

1 3. im., 165.07, 227.01 (3m), 227.05, 227.10 (2g), 227.11 (3), 227.112, 227.135 (1)
2 (g), 227.135 (1) (h), 227.135 (2) (a) 2., 227.135 (4) (a) 1. to 6., 227.135 (6), 227.137
3 (2m), 227.137 (3) (e) 1. to 4., 227.137 (3m), 227.138 (1g), 227.18 (3m), 227.26 (2)
4 (im), 227.47 (3), 238.04 (15), 238.399 (3) (am), 301.03 (16), 343.165 (8), 343.50
5 (1) (c) 2., 343.50 (3) (c), 803.09 (2m) and 893.825 of the statutes; **relating to:**
6 legislative powers and duties, state agency and authority composition and
7 operations, and administrative rule-making process.

Analysis by the Legislative Reference Bureau

1.

This bill changes the Department of Justice gifts and grants appropriations from continuing appropriations to annual appropriations.

2.

This bill eliminates the power of the attorney general to appoint a solicitor general and up to three deputy solicitors general, each of whom must be licensed to practice law in this state. The effect of the bill is to eliminate the Office of the Solicitor General in the Department of Justice, which represents the state in certain cases on appeal in state and federal courts.

3.

This bill requires a party that alleges that a statute is unconstitutional, or in violation of or preempted by federal law, to serve the speaker of the assembly, the president of the senate, and the senate majority leader with a copy of the proceeding. The bill also requires that, in such cases, the assembly, the senate, and the Joint Committee on Legislative Organization (JCLO) are entitled to be heard, representing the legislature and the state.

Under current law, if a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and be entitled to be heard. This requirement exists in the statutes for declaratory judgment acts under s. 806.04 (11). The Wisconsin Supreme Court has also extended the requirement to other types of actions involving claims that a statute is unconstitutional. *See Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W.2d 757 (1979). This bill incorporates the *Kurtz* rule into the statutes and extends both the current statutory and *Kurtz* requirements of service and an opportunity to be heard to the legislature when a statute is alleged to be unconstitutional or in violation of or preempted by federal law.

The bill also provides that when a party challenges the constitutionality of a statute, facially or as applied, or challenges a statute as violating or preempted by federal law, as part of a claim or affirmative defense, the assembly, the senate, and

JCLO have the right at any time to intervene and participate in the action and may also retain legal counsel other than the Department of Justice. Under the bill, the Committee on Assembly Organization may intervene in the action, as well as obtain legal counsel, on behalf of the assembly; the Committee on Senate Organization may intervene in the action, as well as obtain legal counsel, on behalf of the senate; and JCLO may intervene in the action, as well as obtain legal counsel, on behalf of the state. If JCLO determines that the interests of the state will be best represented by special counsel appointed by the legislature, JCLO must appoint special counsel to represent the state defendants and act instead of the attorney general. In these circumstances, special counsel has the powers of the attorney general with respect to the litigation to which special counsel has been appointed.

4.

Under current law, DOJ deposits settlement funds that are not committed under the terms of the settlement into a DOJ appropriation and may spend the funds only after submitting a plan for the expenditure to the Joint Committee on Finance for passive review. If JCF does not schedule a meeting to review the proposed plan within 14 days, DOJ may expend the funds as provided in the plan. This bill requires that DOJ must deposit all settlement funds into the general fund. This bill also lapses all unencumbered settlement funds that are currently in the DOJ appropriation into the general fund.

Current law allows the attorney general to compromise or discontinue an action DOJ is prosecuting if the governor approves the compromise or discontinuance. This bill requires JCF to approve the compromise or discontinuance instead of the governor. Current law allows the attorney general to settle and compromise actions in which the attorney general is appearing for and defending the state as the attorney general determines to be in the best interest of the state. This bill requires that, if the action is for injunctive relief or there is a proposed consent decree, the attorney general must submit the settlement or compromise plan to JCF for passive review. If JCF does not schedule a meeting to review the plan within 14 days, the attorney general may proceed, but, if JCF does schedule a meeting, the attorney general may proceed only with the approval of JCF.

The bill further provides that the attorney general may not submit a proposed settlement plan to JCF in which the plan concedes the unconstitutionality or other invalidity of a statute without the approval of JCLO.

5.

Currently, representatives to the assembly and senators, as well as legislative employees, may receive legal representation from the Department of Justice in most legal proceedings. Assembly and senate policies and practices also allow legislators and legislative employees to retain outside legal counsel in some instances.

With respect to the assembly, the bill provides that the speaker of the assembly may authorize a representative to the assembly or assembly employee who requires legal representation to obtain outside legal counsel if the acts or allegations underlying the action are arguably within the scope of the representative's or employee's duties. The speaker may also obtain outside legal counsel in any action

in which the assembly is a party or in which the interests of the assembly are affected, as determined by the speaker.

With respect to the senate, the bill provides that the senate majority leader may authorize a senator or senate employee who requires legal representation to obtain outside legal counsel if the acts or allegations underlying the action are arguably within the scope of the senator's or employee's duties. The majority leader may also obtain outside legal counsel in any action in which the senate is a party or in which the interests of the senate are affected, as determined by the majority leader.

Finally, the bill provides that the cochairpersons of the Joint Committee on Legislative Organization may authorize a legislative service agency employee who requires legal representation to obtain outside legal counsel if the acts or allegations underlying the action are arguably within the scope of the employee's duties. The cochairpersons may also obtain outside legal counsel in any action in which the legislature is a party or in which the interests of the legislature are affected, as determined by the cochairpersons.

6.

The bill provides that any individual nominated by the governor or another state officer or agency, and with the advice and consent of the senate appointed, to any office or position may not hold the office or position, be nominated again for the office or position, or perform any duties of the office or position during the legislative session biennium if the individual's confirmation for the office or position is rejected by the senate. Currently, there is no prohibition against the governor or another state officer or agency nominating the individual again for the office or position or appointing the individual to the office or position as a provisional appointment.

7.

This bill requires the Department of Administration to submit any proposed changes to security at the capitol, including the posting of a firearm restriction, to the Joint Committee on Legislative Organization for approval under passive review.

8.

This bill requires the Department of Veterans Affairs to submit to the Joint Committee on Finance a notification of any transfers of funds from the unencumbered balance of certain appropriations for veterans homes to the veterans trust fund or the veterans mortgage loan repayment fund. Current law allows those transfers to be made without any notification.

9.

Under current law, no later than September 15 of each even-numbered year, each executive state agency must file with the Department of Administration the agency's budget request for the succeeding biennium. This bill requires each agency to include with its biennial budget request a report that lists each fee the agency is authorized to charge. The report must also include the following:

1. The amount of each fee or the method of calculating the fee if there is no fixed amount.
2. An identification of the agency's statutory authority to charge each fee.
3. A statement whether or not the agency currently charges the fee.

4. A description of whether and how each fee has changed over time.

5. Any recommendation the agency has concerning each fee.

The bill defines "fee" as any amount of money other than a tax that an agency charges a person other than a governmental entity.

10.

This bill requires the Building Commission to establish an amortization schedule for each short-term, general obligation debt authorized by the commission. The amortization schedule must provide that a portion of the principal amount of the debt is retired annually over the life of the improvement or asset to which the debt is related. An amortization schedule established as required under the bill may not be modified except as authorized by the Joint Committee on Finance under passive review.

11.

This bill increases the size of the Group Insurance Board by four members. The new members are appointed, respectively, by the speaker of the assembly, the assembly minority leader, the senate majority leader, and the senate minority leader. The bill also provides that the six members appointed by the governor for two-year terms are subject to senate confirmation.

12.

Under current law, the Department of Natural Resources administers the municipal flood control and riparian restoration program, which provides grants that pay a portion of the costs of facilities and structures for the collection and transmission of storm water, including the purchase of flowage and conservation easements on lands within floodways, and of floodproofing public and private structures located in the 100-year floodplain. Current law requires DNR to promulgate rules specifying eligibility criteria for projects and for determining which projects will receive financial assistance. However, under current law, during the 2017-19 fiscal biennium, DNR must consider an applicant to be eligible for such a grant if the project is funded or executed in whole or in part by the U.S. Army Corps of Engineers' small flood control projects program, and DNR must provide such an applicant with a cost-sharing grant not to exceed \$14,600,000. This bill extends this requirement to the 2019-21 biennium as well.

13.

Under current law, the Department of Administration contracts with a vendor to provide web-based technology services through a web portal to state agencies, state authorities, units of the federal government, local governmental units, tribal schools, individuals, and entities in the private sector. Revenue received from the fees charged for certain services provided through the self-funded web portal is disbursed as payment to the vendor.

This bill requires DOA to submit to the Joint Committee on Finance and the legislature by October 1 of each year a report on the administration of the self-funded portal. The report must include the following information: 1) a financial statement of state revenues and expenditures; 2) a list of services available; 3) fees

charged for each service; 4) the activity level of each service; and 5) any other information that DOA determines is appropriate to include.

14.

Under current law, the board of directors of the Wisconsin Economic Development Corporation consists of 12 voting members as follows:

1. Six members are appointed by the governor subject to senate confirmation, to serve at the pleasure of the governor.

2. Three members are appointed by the speaker of the assembly, consisting of one majority and one minority party representative to the assembly and one person employed in the private sector, all of whom serve at the speaker's pleasure.

3. Three members are appointed by the senate majority leader, consisting of one majority and one minority party senator and one person employed in the private sector, all of whom serve at the majority leader's pleasure.

Under this bill, the board consists of 12 voting members. However, the governor appoints four members. The speaker of the assembly and the senate majority leader each appoint three members, but the appointees need not be members of the legislature nor employed in the private sector. The minority leader of each house appoints one member to the board.

The bill further provides that the chief executive officer of WEDC is appointed by the board of directors of WEDC and serves at the pleasure of the board. Currently, the governor appoints the CEO.

15.

Current law requires the Department of Administration, at the direction of the Joint Committee on Legislative Organization, to lease or acquire office space for legislative offices or legislative service agencies. This bill requires instead that the cochairpersons of JCLO lease or acquire office space for legislative offices or legislative services agencies.

16.

This bill requires all executive branch state agencies, other than the Board of Regents of the University of Wisconsin System, to submit a quarterly report to the Joint Committee on Finance listing all state agency expenditures for state operations in the preceding calendar quarter. The report must specifically detail all expenditures for administrative supplies and services that are made at the discretion of or to be used by heads of state agencies, secretaries, deputy secretaries, assistant deputy secretaries, and executive assistants. Under the bill, "state operations" means all agency expenditures except aids to individuals and organizations and local assistance.

17.

This bill requires that the Wisconsin Economic Development Corporation obtain approval from the Joint Committee on Finance under passive review before WEDC designates a new enterprise zone under the enterprise zone tax credit program. The bill also eliminates any restriction on the number of enterprise zones WEDC may designate. Currently, WEDC may not designate more than 30 enterprise zones.

18.

This bill requires the Department of Corrections to submit a report to the legislature upon request, and to post the report on its website, regarding individuals who, since the previous report or during a date range specified in the request, were pardoned or released from imprisonment before completing their sentences. The report must identify each individual by name, include the crime for which he or she was convicted, and provide the name of the person who pardoned the individual or authorized the early release. If an individual appears on a report requested under this bill and is subsequently convicted of a crime, this bill requires DOC to report also the name of that individual and the crime.

19.

Generally, under current law, an agency planning to promulgate an administrative rule, including an emergency rule, must first prepare a statement of the scope of the proposed rule (scope statement). A scope statement must be submitted to the Department of Administration for a determination as to whether the agency has the explicit authority to promulgate the rule as proposed in the scope statement. DOA must then report the statement and its determination to the governor who, in his or her discretion, may approve or reject the scope statement. Also under current law, after a proposed administrative rule, including an emergency rule, is in final draft form, the agency promulgating the proposed rule must submit the proposed rule to the governor, who may approve or reject the proposed rule. No agency may promulgate an administrative rule without the written approval of the governor.

In *Coyne v. Walker*, 2016 WI 38, the Wisconsin Supreme Court held that provisions requiring gubernatorial approval of scope statements and rules are unconstitutional as applied to the superintendent of public instruction.

Consistent with the result in *Coyne*, this bill exempts rules promulgated by the Department of Public Instruction from the requirements that a) a scope statement be submitted to DOA for a determination of authority and that the scope statement be approved by the governor and b) a proposed rule in final draft form be submitted to the governor and that the governor approve the rule in writing.

20.

This bill requires a state agency to provide a statutory or administrative rule citation for any statement or interpretation of law that the agency provides in its informational materials.

21.

This bill allows the legislature to request an independent retrospective economic impact analysis (EIA) for a rule.

Under current law, either cochairperson of the Joint Committee for Review of Administrative Rules may request an independent EIA for a proposed rule after an agency submits its EIA for that proposed rule. Such a request by the senate cochairperson of JCRAR requires approval by the Committee on Senate Organization, and a request by the assembly cochairperson requires approval by the Committee on Assembly Organization. Current law requires the requester to enter

into a contract to perform the independent EIA, and requires the analysis to be completed within 60 days after entering into the contract. Under current law, an independent EIA is paid for by the agency if the independent EIA's cost estimate for the proposed rule varies by 15 percent or more from the agency's EIA, and is paid for by the legislature if the independent EIA's cost estimate for the proposed rule varies by less than 15 percent from the agency's EIA.

Also under current law, either cochairperson of JCRAR may request an agency to conduct a retrospective EIA for existing rules, which must contain certain information and analysis about the economic impact of the agency's existing rules. This bill allows either cochairperson of JCRAR to request an independent retrospective EIA for a rule within 90 days after an agency submits a retrospective EIA for the rule. The bill specifies that a request for an independent retrospective EIA for a rule follows the same procedure and payment method as a request for an independent EIA for a proposed rule.

22.

Under current law, as the final step of the administrative rule process, an agency must file a certified copy of a rule with the Legislative Reference Bureau for publication. Filing a certified copy of a rule with the LRB creates a number of presumptions, including that the rule was duly promulgated by the agency and that all of the required rule-making procedures were complied with.

This bill eliminates the statutory presumptions that a rule was "duly" promulgated by the agency and that all of the required rule-making procedures were complied with.

23.

Under current law, a state agency must prepare a fiscal estimate for each proposed rule, which must describe the fiscal effect of the proposed rule on local governmental fiscal liabilities and revenues, the fiscal effect of the proposed rule on state government, and, for rules that the agency determines may have a significant fiscal effect on the private sector, the anticipated costs that will be incurred by the private sector in complying with the rule. Also under current law, the agency must prepare an economic impact analysis for a proposed rule, which must contain certain specified information on the economic effect of the proposed rule on specific businesses, business sectors, public utility ratepayers, local governmental units, and the state's economy as a whole, as well as certain other information regarding the economic impact of the proposed rule.

This bill specifically requires an economic impact analysis for a proposed rule to be prepared and submitted separately from the fiscal estimate for the proposed rule.

24.

This bill provides that a plan submitted by an agency to the federal government for the purpose of complying with federal law (compliance plan) does not confer rule-making authority and cannot be used by an agency as authority to promulgate rules. The bill provides that no agency may agree to promulgate a rule as a component of a compliance plan unless the agency has explicit statutory authority

to promulgate the rule at the time the compliance plan is submitted to the federal government.

25.

Under current law, administrative rules that are in effect may be temporarily suspended by the Joint Committee for Review of Administrative Rules. If JCRAR suspends a rule, JCRAR must introduce bills in each house of the legislature to make the suspension permanent. If neither bill to support the suspension is ultimately enacted, the rule may remain in effect and JCRAR may not suspend the rule again.

This bill provides that JCRAR may suspend a rule multiple times.

26.

Under current law, an agency may, by rule or by an order in a particular case, specify that the decision of a hearing examiner who conducts a hearing in a contested case proceeding is the final decision of the agency. This bill prohibits an agency from delegating the authority to issue a final decision in a contested case to a hearing examiner. This bill also requires that all final decisions of an agency must be approved, signed, and dated by the secretary of the agency.

27.

Under current law, an applicant for a driver's license or identification card must provide to the Department of Transportation 1) an identification document that includes either the applicant's photograph or both the applicant's full legal name and date of birth; 2) documentation showing the applicant's date of birth, which may be the same as item 1; 3) proof of the applicant's social security number or verification that the applicant is not eligible for a social security number; 4) documentation showing the applicant's name and address of principal residence; and 5) documentary proof that the applicant is a U.S. citizen or is otherwise lawfully present in the United States.

In 2015 and 2017, DOT promulgated rules, the first establishing and the second modifying, a procedure by which persons requesting free identification cards for the purpose of voter identification could receive these cards despite being unable to provide required documentary proof. In general, the procedure requires an applicant to provide DOT with either 1) the applicant's full legal name, date of birth, place of birth, and any other birth record information requested by DOT; or 2) the applicant's alien or U.S. citizenship and immigration service number or U.S. citizenship certificate number. DOT then shares this information with the Department of Health Services or the federal government for the purpose of verifying the applicant's identity. In general, a person may receive a voter identification card under this procedure if either DHS or the federal government verifies the person's identity or if DOT receives acceptable alternate documentation. This bill incorporates this verification procedure into the statutes.

DOT's 2017 rule also provided a procedure by which an applicant for an identification card could obtain a card with a name other than the name that appears on the applicant's supporting documentation. The bill also incorporates this procedure into the statutes.

Under current law, an unexpired identification card issued by an accredited university or college in this state may be used as identification for voting purposes

if it contains a photograph and the signature of the person to whom it was issued, it expires no later than two years after the date of issuance, and the person establishes that he or she is enrolled as a student at the university or college on election day. The Government Accountability Board (now the Elections Commission) promulgated a rule to clarify that an identification card issued by a technical college that is governed by this state's technical college system may be used for voting purposes. The bill codifies the rule.

28.

The bill a) requires committees appointed by agencies to provide advice with respect to rule making to submit a list of the members of the committee to JCRAR; b) makes various changes with respect to the required content and preparation of statements of scope and EIAs for rules, including mandating minimum comment periods for EIAs for rules; c) prohibits an agency from submitting a statement of scope for a proposed rule to the LRB for publication in the register more than 30 days after the date of the governor's approval of the statement of scope without the approval of the governor; and d) codifies current practice by allowing an agency that intends to concurrently promulgate an emergency rule and a permanent rule that are identical in substance to submit one statement of scope indicating this intent.

29.

This bill 1) prohibits a court from according deference to agency interpretations of law in certain proceedings and prohibits agencies from seeking deference in any proceeding to agency interpretations of law; 2) establishes various requirements with respect to the adoption and use of guidance documents by agencies, including requirements that agencies must comply with in order to adopt guidance documents; and 3) provides that settlement agreements do not confer rule-making authority.

Generally under current law, when reviewing an agency decision in a contested case or other matter subject to judicial review under the law governing administrative procedure for state agencies, a court must accord due weight to the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. Consistent with the Wisconsin Supreme Court's decision in *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, the bill limits this directive such that a court performing judicial review of such a decision must accord no deference to an agency's interpretation of law.

The bill also provides that no agency may seek deference in any proceeding based on the agency's interpretation of any law.

Subject to various exceptions, the bill defines "guidance document" as any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that 1) explains the agency's implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency; or 2) provides guidance or advice with respect to how the agency is likely to apply any statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected.

The bill requires each agency to submit each proposed guidance document to the Legislative Reference Bureau for publication in the register and to provide a

period for persons to submit written comments to the agency on the proposed guidance document. The agency must retain all written comments submitted during the public comment period and consider those comments in determining whether to adopt the guidance document as originally proposed, modify the proposed guidance document, or take any other action. The bill allows for a comment period of less than 21 days with the approval of the governor. The bill also requires each adopted guidance document, while valid, to remain available on the agency's Internet site and requires the agency to permit continuing public comment on the guidance document. Each guidance document must be signed by the head of the agency below a statement containing certain certifications.

The bill provides that a guidance document does not have the force of law and does not provide the authority for implementing or enforcing a standard, requirement, or threshold, including as a term or condition of any license. An agency that proposes to rely on a guidance document to the detriment of a person in any proceeding must afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the guidance document, and an agency may not use a guidance document to foreclose consideration of any issue raised in the guidance document. The bill also contains other provisions with respect to agency use of and reliance upon guidance documents, allows certain persons to petition an agency to promulgate a rule in place of a guidance document, and makes guidance documents subject to the same judicial review provisions as apply to rules.

The bill requires the Legislative Council staff to provide agencies with assistance in determining whether documents and communications are guidance documents as defined in the bill.

The bill provides that, as of six months after the bill's effective date, any guidance document that does not comply with the requirements in the bill is considered to be rescinded.

The bill provides that a settlement agreement, consent decree, or court order does not confer rule-making authority and cannot be used by an agency as authority to promulgate rules. The bill provides that no agency may agree to promulgate a rule as a term in any settlement agreement, consent decree, or stipulated order of a court unless the agency has explicit statutory authority to promulgate the rule at the time the settlement agreement, consent decree, or stipulated order of a court is executed.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

- 1 **SECTION 1.** 5.02 (6m) (f) of the statutes is amended to read:
- 2 **5.02 (6m)** (f) An unexpired identification card issued by a university or college
- 3 in this state that is accredited, as defined in s. 39.30 (1) (d), or by a technical college

1 in this state that is a member of and governed by the technical college system under
2 ch. 38, that contains the date of issuance and signature of the individual to whom it
3 is issued and that contains an expiration date indicating that the card expires no
4 later than 2 years after the date of issuance if the individual establishes that he or
5 she is enrolled as a student at the university or college on the date that the card is
6 presented.

7 **SECTION 2.** 13.103 of the statutes is created to read:

8 **13.103 Joint committee on finance; state operations expenditures**
9 **report. (1)** In this section:

10 (a) "State agency" means any office, department, or independent agency in the
11 executive branch of state government, other than the Board of Regents of the
12 University of Wisconsin System.

13 (b) "State operations" means all purposes except aids to individuals and
14 organizations and local assistance.

15 (2) Quarterly, beginning in January 2019, each state agency shall submit a
16 report to the joint committee on finance listing all state agency expenditures for state
17 operations in the preceding calendar quarter. The report shall specifically detail all
18 expenditures for administrative supplies and services that are made at the
19 discretion of or to be used by heads of state agencies, secretaries, deputy secretaries,
20 assistant deputy secretaries, and executive assistants.

21 **SECTION 3.** 13.124 of the statutes is created to read:

22 **13.124 Legal representation. (1)** (a) The speaker of the assembly, in his or
23 her sole discretion, may authorize a representative to the assembly or assembly
24 employee who requires legal representation to obtain legal counsel other than from
25 the department of justice, with the cost of representation paid from the appropriation

1 under s. 20.765 (1) (a), if the acts or allegations underlying the action are arguably
2 within the scope of the representative's or employee's duties. The speaker shall
3 approve all financial costs and terms of representation.

4 (b) The speaker of the assembly, in his or her sole discretion, may obtain legal
5 counsel other than from the department of justice, with the cost of representation
6 paid from the appropriation under s. 20.765 (1) (a), in any action in which the
7 assembly is a party or in which the interests of the assembly are affected, as
8 determined by the speaker. The speaker shall approve all financial costs and terms
9 of representation.

10 (2) (a) The senate majority leader, in his or her sole discretion, may authorize
11 a senator or senate employee who requires legal representation to obtain legal
12 counsel other than from the department of justice, with the cost of representation
13 paid from the appropriation under s. 20.765 (1) (b), if the acts or allegations
14 underlying the action are arguably within the scope of the senator's or employee's
15 duties. The senate majority leader shall approve all financial costs and terms of
16 representation.

17 (b) The senate majority leader, in his or her sole discretion, may obtain legal
18 counsel other than from the department of justice, with the cost of representation
19 paid from the appropriation under s. 20.765 (1) (b), in any action in which the senate
20 is a party or in which the interests of the senate are affected, as determined by the
21 senate majority leader. The senate majority leader shall approve all financial costs
22 and terms of representation.

23 (3) (a) The cochairpersons of the joint committee on legislative organization,
24 in their sole discretion, may authorize an employee of a legislative service agency, as
25 defined in s. 13.90 (1m) (a), who requires legal representation to obtain legal counsel

1 other than from the department of justice, with the cost of representation paid from
2 the appropriation under s. 20.765 (1) (a) or (b), as determined by the cochairpersons,
3 if the acts or allegations underlying the action are arguably within the scope of the
4 employee's duties. The cochairpersons shall approve all financial costs and terms of
5 representation.

6 (b) The cochairpersons of the joint committee on legislative organization, in
7 their sole discretion, may obtain legal counsel other than from the department of
8 justice, with the cost of representation paid from the appropriation under s. 20.765
9 (1) (a) or (b), as determined by the cochairpersons, in any action in which the
10 legislature is a party or in which the interests of the legislature are affected, as
11 determined by the cochairpersons. The cochairpersons shall approve all financial
12 costs and terms of representation.

13 **SECTION 4.** 13.127 of the statutes is created to read:

14 **13.127 Advice and consent of the senate.** Any individual nominated by the
15 governor or another state officer or agency, and with the advice and consent of the
16 senate appointed, to any office or position may not hold the office or position, be
17 nominated again for the office or position, or perform any duties of the office or
18 position during the legislative session biennium if the individual's confirmation for
19 the office or position is rejected by the senate.

20 **SECTION 5.** 13.365 of the statutes is created to read:

21 **13.365 Intervention.** Pursuant to s. 803.09 (2m), when a party to an action
22 challenges in state or federal court the constitutionality of a statute, facially or as
23 applied, or challenges a statute as violating or preempted by federal law, as part of
24 a claim or affirmative defense:

1 (1) The committee on assembly organization may intervene at any time in the
2 action on behalf of the assembly. The committee on assembly organization may
3 obtain legal counsel other than from the department of justice, with the cost of
4 representation paid from the appropriation under s. 20.765 (1) (a), to represent the
5 assembly in any action in which the assembly intervenes.

6 (2) The committee on senate organization may intervene at any time in the
7 action on behalf of the senate. The committee on senate organization may obtain
8 legal counsel other than from the department of justice, with the cost of
9 representation paid from the appropriation under s. 20.765 (1) (b), to represent the
10 senate in any action in which the senate intervenes.

11 (3) The joint committee on legislative organization may intervene at any time
12 in the action on behalf of the state. The joint committee on legislative organization
13 may obtain legal counsel other than from the department of justice, with the cost of
14 representation paid from the appropriation under s. 20.765 (1) (a) or (b), as
15 determined by the cochairpersons, to represent the state in any action in which the
16 joint committee on legislative organization intervenes.

17 **SECTION 6.** 13.48 (24m) of the statutes is created to read:

18 **13.48 (24m)** REPAYMENT OF PRINCIPAL ON SHORT-TERM COMMERCIAL PAPER. (a)
19 *Definition.* In this subsection, "commercial paper program" means a program
20 authorized by the building commission for the issuance of short-term, general
21 obligation debt in lieu of long-term, general obligation debt.

22 (b) *Amortization schedule required.* For each commercial paper program, the
23 building commission shall establish an amortization schedule for the repayment of
24 principal on debt issued under the program so that a portion of the principal amount
25 of each debt is retired annually over the life of the improvement or asset to which the

1 debt is related. The commission shall provide each amortization schedule
2 established under this paragraph to the joint committee on finance.

3 (c) *Schedule modification.* An amortization schedule established under par. (b)
4 may not be modified except as follows:

5 1. Before the building commission modifies the amortization schedule, the
6 commission shall notify the joint committee on finance in writing of the commission's
7 intention to modify the amortization schedule. The notice shall describe each
8 modification and the reasons for making the modification.

9 2. If, within 14 working days after the date of the building commission's notice
10 under subd. 1., the cochairpersons of the joint committee on finance do not notify the
11 commission that the committee has scheduled a meeting to review the commission's
12 proposal, the commission may make each modification as proposed in the notice. If,
13 within 14 working days after the date of the commission's notice under subd. 1., the
14 cochairpersons of the committee notify the commission that the committee has
15 scheduled a meeting to review the commission's proposal, the commission may make
16 each proposed modification only upon approval of the committee.

17 **SECTION 7.** 13.56 (2) of the statutes is amended to read:

18 13.56 (2) PARTICIPATION IN CERTAIN PROCEEDINGS. The cochairpersons of the joint
19 committee for review of administrative rules or their designated agents shall accept
20 service made under ss. 227.40 (5) and 806.04 (11). If the committee determines that
21 the legislature should be represented in the proceeding, it shall request the joint
22 committee on legislative organization to designate the legislature's representative
23 for intervene in the proceeding as provided under s. 806.04 (11). The costs of
24 participation in the proceeding shall be paid equally from the appropriations under

1 s. 20.765 (1) (a) and (b), except that such costs incurred by the department of justice
2 shall be paid from the appropriation under s. 20.455 (1) (d).

3 **SECTION 8.** 13.90 (2) of the statutes is amended to read:

4 13.90 (2) The cochairpersons of the joint committee on legislative organization
5 or their designated agent shall accept service made under s. ss. 806.04 (11) and
6 893.825 (2). If the committee, the senate organization committee, or the assembly
7 organization committee, determines that the legislature should ~~be represented~~
8 intervene in the proceeding, ~~that committee shall designate the legislature's~~
9 ~~representative for the proceeding.~~ as provided under s. 803.09 (2m), the assembly
10 shall represent the assembly, the senate shall represent the senate, and the joint
11 committee on legislative organization shall represent the state. In an action
12 involving the constitutionality of a statute, or challenging a statute as violating or
13 preempted by federal law, if the joint committee on legislative organization
14 determines at any time that the interests of the state will be best represented by
15 special counsel appointed by the legislature, it shall appoint special counsel to
16 represent state defendants and act instead of the attorney general and the attorney
17 general may not participate in the action. Special counsel appointed under this
18 subsection shall have the powers of the attorney general with respect to the litigation
19 to which special counsel has been appointed. The costs of participation in the
20 proceeding shall be paid equally from the appropriations under s. 20.765 (1) (a) and
21 (b), except that such costs incurred by the department of justice shall be paid from
22 the appropriation under s. 20.455 (1) (d).

23 **SECTION 9.** 13.90 (3) of the statutes is renumbered 13.90 (3) (c) and amended
24 to read:

1 13.90 (3) (c) The joint committee on legislative organization shall assign office
2 space for legislative offices and the offices of the legislative service agencies as
3 ~~defined in sub. (1m).~~ The joint committee may assign any space in the capitol not
4 reserved for other uses under s. 16.835. Except as provided in ss. 13.09 (6) and 13.45
5 (4) (c), the joint committee may locate any legislative office or the office of any
6 legislative service agency outside the capitol at another suitable building in the city
7 of Madison.

8 **SECTION 10.** 13.90 (3) (a) and (b) of the statutes are created to read:

9 13.90 (3) (a) In this subsection, "legislative service agency" has the meaning
10 given in sub. (1m).

11 (b) The cochairpersons of the joint committee on legislative organization shall
12 lease or acquire office space for legislative offices or legislative service agencies under
13 par. (c).

14 **SECTION 11.** 13.91 (1) (c) of the statutes is amended to read:

15 13.91 (1) (c) Perform the functions prescribed in ~~s. 227.15 for the review and~~
16 ~~resolution of problems~~ ch. 227 relating to administrative rules and guidance
17 documents.

18 **SECTION 12.** 15.07 (1) (b) 24. of the statutes is created to read:

19 15.07 (1) (b) 24. The 6 members of the group insurance board appointed under
20 s. 15.165 (2) (j).

21 **SECTION 13.** 15.165 (2) of the statutes is renumbered 15.165 (2) (intro) and
22 amended to read:

23 15.165 (2) GROUP INSURANCE BOARD. (intro.) There is created in the department
24 of employee trust funds a group insurance board. The board shall consist of the
25 following members:

1 (a) The governor, the or his or her designee.

2 (b) The attorney general, the or his or her designee.

3 (c) The secretary of administration, the director of the office of state
4 employment relations, and the or his or her designee.

5 (e) The commissioner of insurance or their designees, and 6 his or her designee.

6 (j) Six persons appointed for 2-year terms, of whom one shall be an insured
7 participant in the Wisconsin Retirement System who is not a teacher, one shall be
8 an insured participant in the Wisconsin Retirement System who is a teacher, one
9 shall be an insured participant in the Wisconsin Retirement System who is a retired
10 employee, one shall be an insured employee of a local unit of government, and one
11 shall be the chief executive or a member of the governing body of a local unit of
12 government that is a participating employer in the Wisconsin Retirement System.

13 **SECTION 14.** 15.165 (2) (d) and (f) to (i) of the statutes are created to read:

14 15.165 (2) (d) The administrator of the division of personnel management in
15 the department of administration or his or her designee.

16 (f) One individual appointed by the speaker of the assembly.

17 (g) One individual appointed by the minority leader of the assembly.

18 (h) One individual appointed by the majority leader of the senate.

19 (i) One individual appointed by the minority leader of the senate.

20 **SECTION 15.** 16.42 (5) of the statutes is created to read:

21 16.42 (5) (a) In this subsection, "fee" means any amount of money other than
22 a tax that an agency charges a person other than a governmental entity.

23 (b) Each agency required to submit a budget request under sub. (1) shall
24 include with its request a report that lists each fee the agency is required or
25 otherwise authorized to charge and that includes all of the following:

1 1. The amount of each fee, or, if a fee does not have a fixed amount, the method
2 of calculating the fee.

3 2. An identification of the agency's statutory authority to charge each fee.

4 3. A statement whether or not the agency currently charges the fee.

5 4. A description of whether and how each fee has increased or decreased since
6 the agency was first authorized to charge the fee.

7 5. Any recommendation the agency has concerning each fee.

8 **SECTION 16.** 16.84 (2m) of the statutes is created to read:

9 **16.84 (2m)** Send notice to the joint committee on legislative organization of any
10 proposed changes to security at the capitol, including the posting of a firearm
11 restriction under s. 943.13 (1m) (c) 2. or 4. If, within 14 working days after the date
12 of the notice, the cochairpersons of the joint committee on legislative organization do
13 not notify the department that the committee has scheduled a meeting to review the
14 department's proposal, the department may implement the changes as proposed in
15 the notice. If, within 14 working days after the date of the department's notice, the
16 cochairpersons of the committee notify the department that the committee has
17 scheduled a meeting to review the department's proposal, the department may
18 implement the proposed changes only upon approval of the committee.

19 **SECTION 17.** 16.84 (5) (d) of the statutes is repealed.

20 **SECTION 18.** 16.973 (15) of the statutes is created to read:

21 **16.973 (15)** By October 1 of each year, submit to the joint committee on finance
22 and the legislature under s. 13.172 (2) a report on the administration of the
23 information technology and communication services self-funded portal. The report
24 shall include the following information regarding the portal for the immediately
25 preceding fiscal year:

1 (a) A financial statement of state revenues and expenditures.

2 (b) A list of services available through the portal, identifying services added
3 since the previous reporting period.

4 (c) Fees charged for each service available through the portal.

5 (d) The activity level of each service available through the portal.

6 (e) Any other information the department determines to be appropriate to
7 include.

8 **SECTION 19.** 20.455 (1) (gh) of the statutes is amended to read:

9 20.455 (1) (gh) *Investigation and prosecution.* Moneys received under ss. 23.22
10 (9) (c), 49.49 (6), 100.263, 133.16, 281.98 (2), 283.91 (5), 289.96 (3) (b), 291.97 (3),
11 292.99 (2), 293.87 (4) (b), 295.19 (3) (b) 2., 295.79 (4) (b), and 299.97 (2), for the
12 expenses of investigation and prosecution of violations, including attorney fees, and
13 for expenses related to s. 165.055 (3).

14 **SECTION 20.** 20.455 (2) (gb) of the statutes is amended to read:

15 20.455 (2) (gb) *Gifts and grants.* The amounts in the schedule to carry out the
16 purposes for which gifts and grants are made and received. All moneys received from
17 gifts and grants, other than moneys received for and credited to another
18 appropriation account under this subsection, ~~to carry out the purposes for which~~
19 ~~made and received~~ shall be credited to this appropriation account.

20 **SECTION 21.** 20.455 (3) (g) of the statutes is amended to read:

21 20.455 (3) (g) *Gifts, grants and proceeds.* The amounts in the schedule to carry
22 out the purposes for which gifts and grants are made and collected. All moneys
23 received from gifts and grants and all proceeds from services, conferences, and sales
24 of publications and promotional materials ~~to carry out the purposes for which made~~
25 ~~or collected~~, except as provided in sub. (2) (gm) and (gp) and to transfer to s. 20.505

(1) (kg), at the discretion of the attorney general, an amount not to exceed \$98,300 annually, shall be credited to this appropriation account.

SECTION 22. 35.93 (2) (b) 3. im. of the statutes is created to read:

35.93 (2) (b) 3. im. Notices of public comment periods on proposed guidance documents under s. 227.112 (1) (a).

SECTION 23. 45.57 of the statutes is amended to read:

45.57 **Veterans homes; transfer of funding.** The department may transfer all or part of the unencumbered balance of any of the appropriations under s. 20.485 (1) (g), (gd), (gk), or (i) to the veterans trust fund or to the veterans mortgage loan repayment fund. The department shall notify the joint committee on finance in writing of any balance transferred under this section.

SECTION 24. 165.055 (3) of the statutes is repealed.

SECTION 25. 165.07 of the statutes is created to read:

165.07 Intervention by joint committee on legislative organization. If the joint committee on legislative organization intervenes in an action in state or federal court as permitted under s. 803.09 (2m), the attorney general shall notify the court of the substitution of counsel by special counsel appointed by the joint committee on legislative organization and may not participate in the action.

SECTION 26. 165.08 of the statutes is renumbered 165.08 (1) and amended to read:

165.08 (1) Any civil action prosecuted by the department by direction of any officer, department, board, or commission, shall be compromised or discontinued when so directed by such officer, department, board, or commission.

(2) Any civil action prosecuted by the department on the initiative of the attorney general, or at the request of any individual may be compromised or

1 discontinued with the approval of the governor by submitting a proposed plan to the
2 joint committee on finance for the approval of the committee. The compromise or
3 discontinuance may occur only if the joint committee on finance approves the
4 proposed plan. No proposed plan may be submitted to the joint committee on finance
5 if the plan concedes the unconstitutionality or other invalidity of a statute, facially
6 or as applied, or concedes that a statute violates or is preempted by federal law,
7 without the approval of the joint committee on legislative organization.

8 (3) In any criminal action prosecuted by the attorney general, the department
9 shall have the same powers with reference to such action as are vested in district
10 attorneys.

11 SECTION 27. 165.10 of the statutes, as created by 2017 Wisconsin Act 59, is
12 amended to read:

13 **165.10 Limits on expenditure Deposit of discretionary settlement**
14 **funds.** Notwithstanding s. 20.455 (3), before the The attorney general may expend
15 shall deposit all settlement funds under s. 20.455 (3) (g) that are not committed
16 under the terms of the settlement, the attorney general shall submit to the joint
17 committee on finance a proposed plan for the expenditure of the funds. If the
18 cochairpersons of the committee do not notify the attorney general within 14 working
19 days after the submittal that the committee has scheduled a meeting for the purpose
20 of reviewing the proposed plan, the attorney general may expend the funds to
21 implement the proposed plan. If, within 14 working days after the submittal, the
22 cochairpersons of the committee notify the attorney general that the committee has
23 scheduled a meeting for the purpose of reviewing the proposed plan, the attorney
24 general may expend the funds only to implement the plan as approved by the
25 committee into the general fund.

1 **SECTION 28.** 165.25 (1) of the statutes is amended to read:

2 **165.25 (1) REPRESENT STATE IN APPEALS AND ON REMAND.** Except as provided in
3 ss. 5.05 (2m) (a), 19.49 (2) (a), and 978.05 (5), if the joint committee on legislative
4 organization does not intervene as permitted under s. 803.09 (2m), appear for the
5 state and prosecute or defend all actions and proceedings, civil or criminal, in the
6 court of appeals and the supreme court, in which the state is interested or a party,
7 and attend to and prosecute or defend all civil cases sent or remanded to any circuit
8 court in which the state is a party. ~~Nothing~~ The joint committee on legislative
9 organization may intervene as permitted under s. 803.09 (2m) at any time, and if the
10 committee intervenes, the attorney general shall notify the court of the substitution
11 of counsel by special counsel appointed by the committee to represent the state and
12 may not participate in the action, proceeding, or case. Unless the joint committee on
13 legislative organization intervenes as permitted under s. 803.09 (2m), nothing in this
14 subsection deprives or relieves the attorney general or the department of justice of
15 any authority or duty under this chapter in any other matter.

16 **SECTION 29.** 165.25 (1m) of the statutes is amended to read:

17 **165.25 (1m) REPRESENT STATE IN OTHER MATTERS.** If the joint committee on
18 legislative organization does not intervene as permitted under s. 803.09 (2m), if
19 requested by the governor or either house of the legislature, appear for and represent
20 the state, any state department, agency, official, employee or agent, whether
21 required to appear as a party or witness in any civil or criminal matter, and prosecute
22 or defend in any court or before any officer, any cause or matter, civil or criminal, in
23 which the state or the people of this state may be interested. The joint committee on
24 legislative organization may intervene as permitted under s. 803.09 (2m) at any
25 time, and if the committee intervenes, the attorney general shall notify the court of

1 the substitution of counsel by special counsel appointed by the committee to
2 represent the state and may not participate in the cause or matter. The public service
3 commission may request under s. 196.497 (7) that the attorney general intervene in
4 federal proceedings. All expenses of the proceedings shall be paid from the
5 appropriation under s. 20.455 (1) (d).

6 **SECTION 30.** 165.25 (6) (a) of the statutes is renumbered 165.25 (6) (a) 1. and
7 amended to read:

8 165.25 (6) (a) 1. At Except as provided in § 893.825 (2), at the request of the
9 head of any department of state government, the attorney general may appear for
10 and defend any state department, or any state officer, employee, or agent of the
11 department in any civil action or other matter brought before a court or an
12 administrative agency which is brought against the state department, or officer,
13 employee, or agent for or on account of any act growing out of or committed in the
14 lawful course of an officer's, employee's, or agent's duties. Witness fees or other
15 expenses determined by the attorney general to be reasonable and necessary to the
16 defense in the action or proceeding shall be paid as provided for in s. 885.07. The
17 attorney general may compromise and settle the action as the attorney general
18 determines to be in the best interest of the state except that, if the action is for
19 injunctive relief or there is a proposed consent decree, the attorney general may not
20 compromise or settle the action without first submitting a proposed plan to the joint
21 committee on finance. If, within 14 working days after the plan is submitted, the
22 cochairpersons of the committee notify the attorney general that the committee has
23 scheduled a meeting for the purpose of reviewing the proposed plan, the attorney
24 general may compromise or settle the action only with the approval of the committee.
25 The attorney general may not submit a proposed plan to the joint committee on

1 finance under this subdivision in which the plan concedes the unconstitutionality or
2 other invalidity of a statute, facially or as applied, or concedes that a statute violates
3 or is preempted by federal law, without the approval of the joint committee on
4 legislative organization.

5 2. Members, officers, and employees of the Wisconsin state agencies building
6 corporation and the Wisconsin state public building corporation are covered by this
7 section. Members of the board of governors created under s. 619.04 (3), members of
8 a committee or subcommittee of that board of governors, members of the injured
9 patients and families compensation fund peer review council created under s.
10 655.275 (2), and persons consulting with that council under s. 655.275 (5) (b) are
11 covered by this section with respect to actions, claims, or other matters arising
12 before, on, or after April 25, 1990. The attorney general may compromise and settle
13 claims asserted before such actions or matters formally are brought or may delegate
14 such authority to the department of administration. This paragraph may not be
15 construed as a consent to sue the state or any department thereof or as a waiver of
16 state sovereign immunity.

17 **SECTION 31.** 227.01 (3m) of the statutes is created to read:

18 227.01 (3m) (a) "Guidance document" means, except as provided in par. (b), any
19 formal or official document or communication issued by an agency, including a
20 manual, handbook, directive, or informational bulletin, that does any of the
21 following:

22 1. Explains the agency's implementation of a statute or rule enforced or
23 administered by the agency, including the current or proposed operating procedure
24 of the agency.

1 2. Provides guidance or advice with respect to how the agency is likely to apply
2 a statute or rule enforced or administered by the agency, if that guidance or advice
3 is likely to apply to a class of persons similarly affected.

4 (b) "Guidance document" does not include any of the following:

5 1. A rule that has been promulgated and that is currently in effect or a proposed
6 rule that is in the process of being promulgated.

7 2. A standard adopted, or a statement of policy or interpretation made, whether
8 preliminary or final, in the decision of a contested case, in a private letter ruling
9 under s. 73.035, or in an agency decision upon or disposition of a particular matter
10 as applied to a specific set of facts.

11 3. Any document or activity described in sub. (13) (a) to (zz), except that
12 "guidance document" includes a pamphlet or other explanatory material described
13 under sub. (13) (r) that otherwise satisfies the definition of "guidance document"
14 under par. (a).

15 4. Any document that any statute specifically provides is not required to be
16 promulgated as a rule.

17 5. A declaratory ruling issued under s. 227.41.

18 6. A pleading or brief filed in court by the state, an agency, or an agency official.

19 7. A letter or written legal advice of the department of justice or a formal or
20 informal opinion of the attorney general, including an opinion issued under s.
21 165.015 (1).

22 8. Any document or communication for which a procedure for public input,
23 other than that provided under s. 227.112 (1), is provided by law.

24 9. Any document or communication that is not subject to the right of inspection
25 and copying under s. 19.35 (1).

1 **SECTION 32.** 227.01 (13) (intro.) of the statutes is amended to read:

2 227.01 (13) (intro.) “Rule” means a regulation, standard, statement of policy,
3 or general order of general application ~~which~~ that has the effect force of law and
4 ~~which~~ that is issued by an agency to implement, interpret, or make specific
5 legislation enforced or administered by the agency or to govern the organization or
6 procedure of the agency. “Rule” includes a modification of a rule under s. 227.265.
7 “Rule” does not include, and s. 227.10 does not apply to, any action or inaction of an
8 agency, whether it would otherwise meet the definition under this subsection, ~~which~~
9 that:

10 **SECTION 33.** 227.05 of the statutes is created to read:

11 **227.05 Agency publications.** An agency shall identify the applicable
12 provision of federal law or the applicable state statutory or administrative code
13 provision that supports any statement or interpretation of law that the agency
14 makes in any publication, whether in print or on the agency’s Internet site, including
15 guidance documents, forms, pamphlets, or other informational materials, regarding
16 the laws the agency administers.

17 **SECTION 34.** Subchapter II (title) of chapter 227 [precedes 227.10] of the
18 statutes is amended to read:

19 **CHAPTER 227**

20 SUBCHAPTER II

21 ADMINISTRATIVE RULES AND

22 GUIDANCE DOCUMENTS

23 **SECTION 35.** 227.10 (2g) of the statutes is created to read:

24 227.10 (2g) No agency may seek deference in any proceeding based on the
25 agency’s interpretation of any law.

1 **SECTION 36.** 227.11 (title) of the statutes is amended to read:

2 **227.11** (title) ~~Extent to which chapter confers~~ **Agency rule-making**
3 **authority.**

4 **SECTION 37.** 227.11 (3) of the statutes is created to read:

5 227.11 (3) (a) A plan that is submitted to the federal government for the
6 purpose of complying with a requirement of federal law does not confer rule-making
7 authority and cannot be used by an agency as authority to promulgate rules. No
8 agency may agree to promulgate a rule as a component of a compliance plan unless
9 the agency has explicit statutory authority to promulgate the rule at the time the
10 compliance plan is submitted.

11 (b) A settlement agreement, consent decree, or court order does not confer
12 rule-making authority and cannot be used by an agency as authority to promulgate
13 rules. No agency may agree to promulgate a rule as a term in any settlement
14 agreement, consent decree, or stipulated order of a court unless the agency has
15 explicit statutory authority to promulgate the rule at the time the settlement
16 agreement, consent decree, or stipulated order of a court is executed.

17 **SECTION 38.** 227.112 of the statutes is created to read:

18 **227.112 Guidance documents.** (1) (a) Before adopting a guidance document,
19 an agency shall submit to the legislative reference bureau the proposed guidance
20 document with a notice of a public comment period on the proposed guidance
21 document under par. (b), in a format approved by the legislative reference bureau,
22 for publication in the register. The notice shall specify the place where comments
23 should be submitted and the deadline for submitting those comments.

24 (b) The agency shall provide for a period for public comment on a proposed
25 guidance document submitted under par. (a), during which any person may submit

1 written comments to the agency with respect to the proposed guidance document.
2 Except as provided in par. (c), the period for public comment shall end no sooner than
3 the 21st day after the date on which the proposed guidance document is published
4 in the register under s. 35.93 (2) (b) 3. im. The agency may not adopt the proposed
5 guidance document until the comment period has concluded and the agency has
6 complied with par. (d).

7 (c) An agency may hold a public comment period shorter than 21 days with the
8 approval of the governor.

9 (d) An agency shall retain all written comments submitted during the public
10 comment period under par. (b) and shall consider those comments in determining
11 whether to adopt the guidance document as originally proposed, modify the proposed
12 guidance document, or take any other action.

13 (2) An agency shall post each guidance document that the agency has adopted
14 on the agency's Internet site and shall permit continuing public comment on the
15 guidance document. The agency shall ensure that each guidance document that the
16 agency has adopted remains on the agency's Internet site as provided in this
17 subsection until the guidance document is no longer in effect, is no longer valid, or
18 is superseded or until the agency otherwise rescinds its adoption of the guidance
19 document.

20 (3) A guidance document does not have the force of law and does not provide
21 the authority for implementing or enforcing a standard, requirement, or threshold,
22 including as a term or condition of any license. An agency that proposes to rely on
23 a guidance document to the detriment of a person in any proceeding shall afford the
24 person an adequate opportunity to contest the legality or wisdom of a position taken

1 in the guidance document. An agency may not use a guidance document to foreclose
2 consideration of any issue raised in the guidance document.

3 (4) If an agency proposes to act in any proceeding at variance with a position
4 expressed in a guidance document, it shall provide a reasonable explanation for the
5 variance. If an affected person in any proceeding may have relied reasonably on the
6 agency's position, the explanation must include a reasonable justification for the
7 agency's conclusion that the need for the variance outweighs the affected person's
8 reliance interest.

9 (5) Persons that qualify under s. 227.12 to petition an agency to promulgate
10 a rule may, as provided in s. 227.12, petition an agency to promulgate a rule in place
11 of a guidance document.

12 (6) Any guidance document shall be signed by the secretary or head of the
13 agency below the following certification: "I have reviewed this guidance document
14 or proposed guidance document and I certify that it complies with sections 227.10
15 and 227.11 of the Wisconsin Statutes. I further certify that the guidance document
16 or proposed guidance document contains no standard, requirement, or threshold
17 that is not explicitly required or explicitly permitted by a statute or a rule that has
18 been lawfully promulgated. I further certify that the guidance document or proposed
19 guidance document contains no standard, requirement, or threshold that is more
20 restrictive than a standard, requirement, or threshold contained in the Wisconsin
21 Statutes."

22 (7) This section does not apply to guidance documents adopted before the first
23 day of the 7th month beginning after the effective date of this subsection [LRB
24 inserts date], but on that date any guidance document that has not been adopted in

1 accordance with sub. (1) or that does not contain the certification required under sub.
2 (6) shall be considered rescinded.

3 (8) The legislative council staff shall provide agencies with assistance in
4 determining whether documents and communications are guidance documents that
5 are subject to the requirements under this section.

6 **SECTION 39.** 227.13 of the statutes is amended to read:

7 **227.13 Advisory committees and informal consultations.** An agency may
8 use informal conferences and consultations to obtain the viewpoint and advice of
9 interested persons with respect to contemplated rule making. An agency also may
10 also appoint a committee of experts, interested persons or representatives of the
11 public to advise it with respect to any contemplated rule making. The Such a
12 committee shall have advisory powers only. Whenever an agency appoints a
13 committee under this section, the agency shall submit a list of the members of the
14 committee to the joint committee for review of administrative rules.

15 **SECTION 40.** 227.135 (1) (g) of the statutes is created to read:

16 227.135 (1) (g) A statement as to whether the agency anticipates that the
17 proposed rule will have minimal or no economic impact, a moderate economic impact,
18 or a significant economic impact, whether locally, statewide, or on a sector of the
19 economy.

20 **SECTION 41.** 227.135 (1) (h) of the statutes is created to read:

21 227.135 (1) (h) For a proposed emergency rule promulgated under s. 227.24,
22 an explanation of why the rule is necessary for the preservation of the public peace,
23 health, safety, or welfare. If the rule is exempt from the required finding of
24 emergency, the statement of scope shall cite the act number and section or the statute
25 section authorizing the promulgation of an emergency rule or a statement that the

1 rule is promulgated at the direction of the joint committee for review of
2 administrative rules under s. 227.26 (2) (b). The agency shall also include a
3 statement as to whether the agency will promulgate a corresponding permanent rule
4 and the agency's anticipated time line for promulgating the permanent rule.

5 **SECTION 42.** 227.135 (2) of the statutes is renumbered 227.135 (2) (a) 1. and
6 amended to read:

7 227.135 (2) (a) 1. An Except as provided in subd. 2., an agency that has
8 prepared a statement of the scope of the proposed rule shall present the statement
9 to the department of administration, which shall make a determination as to
10 whether the agency has the explicit authority to promulgate the rule as proposed in
11 the statement of scope and shall report the statement of scope and its determination
12 to the governor who, in his or her discretion, may approve or reject the statement of
13 scope. The Except as provided in subd. 2., the agency may not send the statement
14 to the legislative reference bureau for publication under sub. (3) until the governor
15 issues a written notice of approval of the statement and may not, without the written
16 approval of the governor, send the statement to the legislative reference bureau for
17 publication under sub. (3) more than 30 days after the date of the governor's approval
18 of the statement of scope.

19 (b) The An agency that has prepared a statement of the scope of the proposed
20 rule shall also present the statement to the individual or body with policy-making
21 powers over the subject matter of the proposed rule for approval. The individual or
22 body with policy-making powers may not approve the statement until at least 10
23 days after publication of the statement under sub. (3) and, if a preliminary public
24 hearing and comment period are held by the agency under s. 227.136, until the

1 individual or body has received and reviewed any public comments and feedback
2 received from the agency under s. 227.136 (5).

3 (c) No state employee or official may perform any activity in connection with
4 the drafting of a proposed rule, except for an activity necessary to prepare the
5 statement of the scope of the proposed rule, until the governor and the individual or
6 body with policy-making powers over the subject matter of the proposed rule
7 approve the statement has been approved as required under pars. (a) and (b). This
8 subsection paragraph does not prohibit an agency from performing an activity
9 necessary to prepare a petition and proposed rule for submission under s. 227.26 (4).

10 **SECTION 43.** 227.135 (2) (a) 2. of the statutes is created to read:

11 227.135 (2) (a) 2. The requirement under subd. 1. does not apply to statements
12 of scope prepared by the department of public instruction.

13 **SECTION 44.** 227.135 (3) of the statutes is amended to read:

14 227.135 (3) ~~If the governor approves a~~ An agency that prepares a statement
15 of the scope of a proposed rule under sub. (2), the agency (1) shall, subject to sub. (2)
16 (a) 1., send an electronic copy of the statement to the legislative reference bureau,
17 in a format approved by the legislative reference bureau, for publication in the
18 register. On the same day that the agency sends the statement to the legislative
19 reference bureau, the agency shall send a copy of the statement to the secretary of
20 administration and to the chief clerks of each house of the legislature, who shall
21 distribute the statement to the cochairpersons of the joint committee for review of
22 administrative rules. The agency shall include with any statement of scope sent to
23 the legislative reference bureau the date of the governor's approval of the statement
24 of scope if such approval is required under sub. (2) (a). The legislative reference
25 bureau shall assign a discrete identifying number to each statement of scope and

1 shall include that number and the date of the governor's approval, if required, in the
2 publication of the statement of scope in the register.

3 **SECTION 45.** 227.135 (4) of the statutes is renumbered 227.135 (4) (a) (intro.)
4 and amended to read:

5 227.135 (4) (a) (intro.) If at any time after a statement of the scope of a proposed
6 rule is approved under sub. (2) the agency changes the scope of the proposed rule in
7 any meaningful or measurable way, ~~including changing the scope of the proposed~~
8 ~~rule so as to include in the scope any activity, business, material, or product that is~~
9 ~~not specifically included in the original scope of the proposed rule~~, the agency shall
10 prepare and obtain approval of a revised statement of the scope of the proposed rule
11 in the same manner as the original statement was prepared and approved under
12 subs. (1) and (2). No For purposes of this subsection, a meaningful or measurable
13 change includes any of the following:

14 (b) Whenever an agency is required to prepare a revised statement of scope
15 under this subsection, no state employee or official may perform any activity in
16 connection with the drafting of the proposed rule except for an activity necessary to
17 prepare the revised statement of the scope of the proposed rule until the revised
18 statement is so approved as provided in sub. (2).

19 **SECTION 46.** 227.135 (4) (a) 1. to 6. of the statutes are created to read:

20 227.135 (4) (a) 1. A change to the objectives of the proposed rule.

21 2. A change to the basis and purpose of the proposed rule.

22 3. A change to the policies to be included in the proposed rule.

23 4. A change to the entities affected by the proposed rule.

24 5. A change to the overall breadth or scope of the regulation in the proposed
25 rule.

1 6. A change to the scope of the proposed rule so as to include in the scope any
2 activity, business, material, or product that is not specifically included in the original
3 statement.

4 **SECTION 47.** 227.135 (6) of the statutes is created to read:

5 227.135 (6) An agency that intends to concurrently promulgate an emergency
6 rule and a permanent rule that are identical in substance may submit one statement
7 of scope indicating this intent.

8 **SECTION 48.** 227.137 (2) of the statutes is amended to read:

9 227.137 (2) An agency shall prepare an economic impact analysis for a
10 proposed rule before submitting the proposed rule to the legislative council staff
11 under s. 227.15. Prior to preparing an economic impact analysis as provided in this
12 subsection, the agency shall review the statement of scope for the proposed rule
13 prepared under s. 227.135 to determine whether a revised statement of scope is
14 required under s. 227.135 (4).

15 **SECTION 49.** 227.137 (2m) of the statutes is created to read:

16 227.137 (2m) An agency's economic impact analysis under sub. (2) or revised
17 economic impact analysis under sub. (4) shall be prepared and submitted separately
18 from any fiscal estimate or revised fiscal estimate prepared and submitted under s.
19 227.14 (4) (a) or (d).

20 **SECTION 50.** 227.137 (3) (e) of the statutes is renumbered 227.137 (3) (e) (intro.)
21 and amended to read:

22 227.137 (3) (e) (intro.) A determination made in consultation with the
23 businesses, local governmental units, and individuals that may be affected by the
24 proposed rule as to whether the proposed rule would adversely affect in a material
25 way the economy, a sector of the economy, productivity, jobs, or the overall economic

1 competitiveness of this state. The agency shall make the determination required
2 under this paragraph by doing all of the following:

3 **SECTION 51.** 227.137 (3) (e) 1. to 4. of the statutes are created to read:

4 227.137 (3) (e) 1. Compiling a list of affected persons and potential economic
5 concerns identified in the comments solicited by the agency.

6 2. Contacting affected persons to discuss economic concerns.

7 3. Considering any raised concerns in drafting the economic impact analysis.

8 4. Documenting in the economic impact analysis the persons who were
9 consulted and whether the agency's determination is disputed by any of the affected
10 persons.

11 **SECTION 52.** 227.137 (3m) of the statutes is created to read:

12 227.137 (3m) (a) When soliciting comments under sub. (3) for an economic
13 impact analysis, an agency shall accept comments for a period of at least 14 calendar
14 days if, under s. 227.135 (1) (g), the statement of scope for the proposed rule indicates
15 that the proposed rule will have minimal or no economic impact, at least 30 calendar
16 days if it indicates a moderate economic impact, and at least 60 calendar days if it
17 indicates a significant economic impact or if the agency anticipates that the proposed
18 rule will result in \$10,000,000 or more in implementation and compliance costs being
19 incurred by or passed along to businesses, local governmental units, and individuals
20 over any 2-year period. If the agency subsequently determines that the anticipated
21 economic impact will be greater than indicated in the statement of scope, the agency
22 shall adjust the comment period accordingly. An agency may not reduce a comment
23 period once determined under this subsection.

24 (b) This subsection does not apply to a person preparing an independent
25 economic impact analysis under sub. (4m).

1 **SECTION 53.** 227.137 (4) of the statutes is amended to read:

2 227.137 (4) On the same day that the agency submits the economic impact
3 analysis to the legislative council staff under s. 227.15 (1), the agency shall also
4 submit that analysis to the department of administration, to the governor, and to the
5 chief clerks of each house of the legislature, who shall distribute the analysis to the
6 presiding officers of their respective houses, to the chairpersons of the appropriate
7 standing committees of their respective houses, as designated by those presiding
8 officers, and to the cochairpersons of the joint committee for review of administrative
9 rules. If a proposed rule is modified after the economic impact analysis is submitted
10 under this subsection so that the economic impact of the proposed rule is
11 significantly changed, the agency shall prepare a revised economic impact analysis
12 for the proposed rule as modified. For purposes of this subsection, a significant
13 change includes an increase or a decrease of at least 10 percent or \$50,000, whichever
14 is greater, in the expected implementation and compliance costs reasonably expected
15 to be incurred by or passed along to a majority of the businesses, local governmental
16 units, and individuals as a result of the proposed rule, as identified under sub. (3) (b),
17 or a significant change in the persons expected to be affected by the proposed rule.
18 A revised economic impact analysis shall be prepared and submitted in the same
19 manner as an original economic impact analysis is prepared and submitted.

20 **SECTION 54.** 227.138 (1) (intro.) of the statutes is renumbered 227.138 (1) and
21 amended to read:

22 227.138 (1) The joint committee for review of administrative rules may direct
23 an agency to prepare a retrospective economic impact analysis for any of an agency's
24 rules that are published in the code. The committee may identify one or more specific
25 chapters, sections, or other subunits in the code that are administered by the agency

1 as the rules that are to be the subject of the analysis and may specify a deadline for
2 the preparation of the analysis.

3 **(1r)** A retrospective economic impact analysis shall contain information on the
4 economic effect of the rules on specific businesses, business sectors, public utility
5 ratepayers, local governmental units, and the state's economy as a whole. When
6 preparing the analysis, the agency or person preparing the analysis shall solicit
7 information and advice from businesses, associations representing businesses, local
8 governmental units, and individuals that have been affected by the rules. The
9 agency or person shall prepare the retrospective economic impact analysis in
10 coordination with local governmental units that have been affected by the rules. The
11 agency or person may request information that is reasonably necessary for the
12 preparation of a retrospective economic impact analysis from other businesses,
13 associations, local governmental units, and individuals and from other agencies.
14 The retrospective economic impact analysis shall include all of the following:

15 **SECTION 55.** 227.138 (1) (a) to (h) of the statutes are renumbered 227.138 (1r)
16 (a) to (h).

17 **SECTION 56.** 227.138 (1g) of the statutes is created to read:

18 227.138 **(1g)** Within 90 days after an agency submits a retrospective economic
19 impact analysis under sub. (2), either cochairperson of the joint committee for review
20 of administrative rules may request an independent retrospective economic impact
21 analysis to be prepared using the same procedure and payment methods described
22 under s. 227.137 (4m) (am) and (b). A person preparing an independent retrospective
23 economic impact analysis under this subsection shall prepare the independent
24 retrospective economic impact analysis for the same rules that were the subject of